No. 945

FILED

MAR 5 1953

HAROLD B. WILLEY, Clerk

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IN THE

SUPREME COURT

OF THE

United States

October Term, 1952

MINES & METALS CORPORATION, STEEL INC. S.A.; BERTRAND L. BALL, GEORGE B. BUSH and R. L. McGINNIS,

Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION

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PETITION FOR WRIT OF CERTIORARI

To The Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Mines & Metals Corporation and Steel Inc. S. A., and Bertrand L. Ball, George B. Bush and R. I. McGinnis, respectfully pray for a writ of certiorari, directed to the United States Court of Appeals for the Ninth Circuit, and for a reversal of its judgment and order.

JURISDICTION

Jurisdiction is conferred by Section 1254 of Title 28, U. S. Code, and by Section 2101(c) Title 28, U. S. Code.

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered on November 20, 1952. The petition for rehearing was denied on December 29, 1952. The petition for certiorari is filed within ninety days of the denial of rehearing.

STATUTES AND REGULATIONS INVOLVED

(1) The Securities and Exchange Act of 1933, as amended in 1934.

(See appendix for copy of act in full.)

(2) Regulation A of the Securities and Exchange Commission.

(The act and regulation are appended to the petition.)

§19(b):

> "For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this sub-chapter, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpoena witnesses, take evidence and require the production of any books, papers, or other documents which the Commission deems relevant or material to the

inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing." 15 U. S. C. A. §77s(b).

§20(a):

"Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts." 15 U. S. C. A. §77t(a).

(3) Title 15, U. S. Codes, Sections 77(b) to 77(i). (See appendix.)

§22(b) of the Securities Act of 1933, 15 U. S. C. A. §77v(b), provides:

"In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so or-

dered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

(4) The Fourth and Fifth Amendments to the Constitution of the United States.

"AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land of naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

OPINIONS BELOW

Mines and Metals Corporation v. Securities and Exchange Commission, 200 F. (2) 317.

SHORT STATEMENT OF THE CASE

The records of two corporations are here involved. One is a Nevada corporation, organized with 100,000 shares of capital stock at $1.00 par value each (R. 26); the other is Steel, Inc., S. A., a foreign corporation organized in the Republic of Panama, with its offices in the City of Panama and having done no business whatsoever in the United States, and having no offices in the United States.

Prior to the organization of Mines and Metals Corporation, its president, Bertrand L. Ball, went to the offices of the Securities and Exchange Commission at San Francisco, California and inquired as to whether a registration would be necessary if the corporation was incorporated for 100,000 shares at $1.00 par each, and was informed at that time that no registration statement would be necessary and that the corporation was and would be exempt from the scope and jurisdiction of the Securities and Exchange Commission. (R. 26). He did not inquire as to the name of the officer who gave him this information, but on or about October 1, 1951, in company with attorney George B. Bush, he saw G. M. Cuthbertson, the attorney for the Securities and Exchange Commission at Los Angeles, California. At that time he had with him the stock certificate books

of Mines and Metals Corporation, showing its incorporation with 100,000 shares of capital stock at $1.00 par value per share, and he informed Mr. Cuthbertson that prior to the formation of the company he had been informed by the Securities and Exchange Commission that no registration statement would be required from the corporation if it did not have more than 100,000 shares of stock at the par value of $1.00 per share, and that no registration statement was or is required. This was not denied by Mr. Cuthbertson, nor did Mr. Cuthbertson ask for or inform Mr. Ball to the contrary.

Steel, Inc., S. A., a foreign corporation has all of its books and records in the City of Panama, Republic of Panama, outside of the jurisdiction of the United States. According to the affidavit on file, it has never sold any stock in the United States and has no offices in the United States. Bertrand Ball, living in the United States, is president of Steel, Inc.

The agents of the Securities and Exchange Commission issued a subpoena to have Ball and the other officers mentioned produce the books and records of both corporations at a hearing set for February 26th and 27th at Los Angeles, California. (R. .....). This was done pursuant to an order of the S. E. C. to make an investigation because "members of its staff have reported to the Commission information which tended to show that Mines and Metals Corporation sold and offered for sale to members of the public certain securities; namely, the $1.00 par value common stock of

Mines and Metals Corporation, and Steel, Inc., made use of the mails and means of transportation in interstate commerce."

R. I. McGinnis, George B. Bush and Bertrand L. Ball then gave Notice of Motions to suppress and quash the subpoenas *duces tecum* and filed, in support thereof, affidavits. (Typewritten Record R. 1 to 7). The grounds of the motions were:

(1) That the Securities and Exchange Commission was and is without jurisdiction of the matters set out in the subpoenas *duces tecum*.

(2) That the subpoenas *duces tecum* are without reasonable or probable cause in that they fail to set out the nature of the investigation; who is under investigation; why the investigation is being conducted, or any statutory authority for its constitutionality, and therefore are in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

(3) That the subpoenas *duces tecum* constitute a fishing expedition and are too broad and exceed the bounds set out by the Fourth Amendment against unlawful searches and seizures.

(4) The inquiry is outside the scope of the authority delegated to the officer making the investigation.

(5) The testimony sought to be illicited is irrelevant to the subject matter of the inquiry.

(6) That the person or persons to whom it is directed cannot be held responsible for the production of the papers set forth therein.

(7) That the subpoenas constitute an exploratory search not authorized by the Act. That the Securities and Exchange Act of 1933, as amended, does not contemplate any securities over which the Securities and Exchange Commission has jurisdiction.

(8) That the purported subpoenas are not issued upon oath or affirmation showing probable cause for their issuance, and therefore are illegal and in violation of the Fourth Amendment to the Constitution of the United States.

(9) That insofar as Section 22 of Title 1, Securities and Exchange Act of 1933, as amended, is concerned, such section must be read in the light of the requirements of the Fourth and Fifth Amendments to the Constitution of the United States and is entirely inadequate.

The Commission countered with an application for an order requiring appearance for the purpose of producing books, papers, records, reports and other documents. (R. 8).

The Securities and Exchange Commission claimed jurisdiction by reason Section 22(b) of the Securities Act of 1933, as amended (15 U. S. C. A. 77(b)). The commission asserted that on December 11, 1951 it ordered an investigation as to the facts and circumstances regarding alleged violations of Section 5(a) of the Securities Act of 1933, as amended, [15 U. S. C. A. 77(e)] and 19(b) of that Act [15 U. S. C. A. 77(s)(b)].

The order on which the Commission relied was "Members of its staff have reported to the commission information which tends to show that: (a) Mines and Metals Corporation, Bertrand L. Ball, George B. Bush and G. E. Kneiper, J. J. McArthur and Willis Vom Norton, during the period from April 14, 1944 to the present sold and offered for sale to the members of the public certain securities, namely, that par value common stock of Mines and Metals Corporation, and (b) Steel, Inc., and Bertrand L. Ball, during the period from April 11, 1951 to the present, sold and offered for sale to members of the public certain securities, namely, the common capital stock of Steel, Inc.," (R. 15, 16). Based upon the order of the Securities and Exchange Commission, the subpoenas were issued requiring the production by Bertrand L. Ball of books and records of both corporations.

In response to this subpoena, and in support of his motion, Bertrand L. Ball swore that he is President of Mines and Metals Corporation; that that corporation is a Nevada corporation, organized with 100,000 shares of $1.00 par value stock; that the corporation is not therefore within the jurisdiction of Securities and Exchange Commission Act of 1933, as amended, and is not within the jurisdiction of any of its officers or agents. He further said that prior to its organization affiant went to the offices of the Securities and Exchange Commission in San Francisco and inquired as to whether a registration statement would be necessary if the corporation was *incorporated* at 100,000 shares of $1.00 par value each, and was informed at

that time that no registration was or would be necessary and that the corporation was and would be *exempt* from the scope and *jurisdiction* of the Securities and Exchange Commission.

That on or about October 1, 1951 affiant in company with George B. Bush, an attorney at law, saw G. N. Cuthbertson, attorney for the Securities and Exchange Commission at the Los Angeles offices of the Securities and Exchange Commission, and at that time he had with him the stock certificate books of Mines and Metals Corporation, showing its incorporation with 100,000 shares of capital stock at $1.00 par value per share, and that he informed Mr. Cuthbertson that he had been advised prior to the inception of the corporation that the Securities and Exchange Commission required no registration statement for a corporation having not more than 100,000 shares of stock of the par value of $1.00 per share, and that the said corporation was and is outside the jurisdiction of the Securities and Exchange Commission. (R. 26, 27).

In reference to Steel, Inc., S. A., he averred that it is a foreign corporation, organized in Panama, Republic of Panama, with its offices in the City of Panama; that it has never sold any stock in the United States and that it had no offices in the United States; that all its books and records are located in the City of Panama, Republic of Panama, outside of the jurisdiction of the United States; that there has been no sale of stock of Steel, Inc., S. A., in the United States of America to the best of his knowledge and belief; that

all of the books and records of Steel, Inc., are located in the City of Panama, Republic of Panama and not in the United States and have been there prior to and at all times since the subpoenas have been issued by the Securities and Exchange Commission and since the date of the alleged order of Securities and Exchange Commission. (R. 27, 28). That the Securities and Exchange Commission has been informed as to the nature and size of the corporation and its jurisdiction regarding the same. That the Commission was and is without jurisdiction to make the order referred to for the reasons hereinbefore stated there was and has been no violation of the Securities and Exchange Act and the commission was and is without jurisdiction to conduct the investigation attempted.

George B. Bush swore that at the time of being served with the subpoena he had not been and does not have any books or records of Mines & Metals in his possession or under his control, and does not know where any such records are located; that Mines & Metals was organized under the laws of the State of Nevada with a capitalization of 100,000 shares having a par value of $1.00 per share; that he was present with Bertrand L. Ball in the offices of G. N. Cuthbertson, attorney for the Securities & Exchange Commission at Los Angeles, and that Mr. Ball made such a statement to Mr. Cuthbertson that he had made inquiry of the San Francisco office of the Commission and was told by them that it was unnecessary to file any formal registration if the corporation was not going to make

a formal public offering by the company of its stock for sale to the public, and that he believed that such registration was not and is not necessary.

The matter came on for hearing in the United States District Court, before District Judge Leon R. Yankwich, who denied the motion of the petitioners to quash the subpoenas *duces tecum* (R. 32) and granted the motion of the Commission to compel the appearance of the petitioners before the Commission as requested in the subpoenas. (R. 38).

From this order an appeal was taken to the United States Court of Appeals for the Ninth Circuit, which affirmed the order (*Mines & Metals Corp. v. Securities & Exchange Commission,* 200 Fed. 2d 317). The court held that there is no exemption, either by virtue of the Act or the regulations thereunder (Regulation A) which provides that conditional upon the filing of a letter of notification with the Commission, exemption will be granted as to certain securities provided the aggregate offering prices shall not exceed $300,000.00. [200 Fed. 2d 320].

The fact that the company was incorporated with 100,000 shares of capital stock with a par value of $1.00 per share, the Circuit Court held, did not make the offering price under $300,000 and it is the offering price, not the par value, that would govern, the court indicated.

Also, the Circuit Court said that even though the petitioners had gone to the offices of the Commission

and inquired as to their rights and their duties and were informed that no registration statement was necesssary and had further informed the attorney for the commission at the time that they came to him with their books of Mines & Metals, such oral advice of the officers of the commission did not effectuate any *waiver* of Regulation A requiring a written letter of notification.

But the court further went so far as to say that "Even if a letter of notification had been filed with the Securities & Exchange Commission, the power and the duty of the Commission to make an investigation would be unaffected." It thus has opened up every corporation in America to investigation by the Securities & Exchange Commission, regardless of whether it files a letter of notification or not.

The court further held that the scanty declaration in the order of the Securities & Exchange Commission that members of its staff had received information which, if true, *tended* to show that there had been a violation of the act was sufficient to give it jurisdiction to order the production of books and records for several years back.

The court also held that even though Steel Inc. was a foreign corporation with all its books and records in Panama, that the mere fact that the officers reside in the United States made the requirement of the production of books and records of that company subject to inspection. The court failed to distinguish this case

from another case which it had decided. *Securities & Exchange Commission v. Minas de Artemisa,* 150 Fed. (2d) 215, 217, where that corporation was actually operating and advertising in the State of Nevada, and where the original corporation Minas de Artemisa Inc. was organized under the laws of Arizona, and in the face of the express language of 19(b) of the Securities & Exchange Act, which provides, "in the conduct of this investigation the Commission may require the attendance of witnesses and the production of documentary evidence "from any place *in* the United States or any *Territory* at any designated place of hearing."

The facts set out in the affidavits of the petitioners were uncontradicted and undisputed.

QUESTIONS PRESENTED BY THIS WRIT

(1) Whether the Securities & Exchange Commission has jurisdiction to order the production of books and records of a corporation organized with 100,000 shares of stock of $1.00 par value each, to-wit, Mines & Metals in Nevada.

(2) Whether the Securities & Exchange Commission has jurisdiction to order the production of the books and records of a corporation, all of whose books and records are outside of the United States, to-wit in the Republic of Panama, and which has not been doing any business in the United States, solely by reason of the fact that its President resides in the United States?

(3) Whether Section 19(b) of the Securities & Exchange Act limits the authority of the Commission to books and records solely within the United States or its territories?

(4) Whether Regulation A requiring merely a notification is complied with, if required at all, by oral notification to the Securities & Exchange Commission, after one of its officers and agents, informs the president of a small corporation that no registration will be required?

(5) Whether officers and agents of the Securities & Exchange Commission may waive the *written* requirement of notification under Regulation A of the Securities and Exchange Act?

(6) Whether that Act is so broad that even if there is a registration under Regulation A no exemption occurs and that the Commission is not obliged to take the word of anyone who files such a letter of notification, thereby opening up every corporation in America to inspection by the Securities & Exchange Corporation?

(7) Whether a *regulation* may be waived by officers of the Securities & Exchange Commission even though a statute may not be waived?

(8) Whether Regulation A regarding "offering price" without further definition is so vague, uncertain and indefinite as not to give men of common knowledge a standard to go by and thus offend that requirement of due process of law guaranteed by the Fifth Amendment requiring that statutes or regulations which may result in a penalty be so certain that anyone of common knowledge may understand the meaning of the plain language of the regulation, which may result in sanctions or penalties?

(9) Whether the Order of the Securities & Exchange Commission was and is in violation of the Fourth and Fifth Amendment to the Constitution of the United States in that the order is based upon such uncertain information as not to form the basis of reasonable or probable cause for commanding the production of books and records?

REASONS FOR GRANTING THE WRIT

I

The case involves an important question of law regarding the scope and extent of the Securities & Exchange Commission's power and jurisdiction to compel the production of books and records, not only of an American corporation but of a foreign corporation, located in a foreign country whose only connection with the United States is that the president thereof resides in the United States.

II

The case involves an important question of interpretation of the Securities & Exchange Act and its regulations regarding the scope and extent of its jurisdiction and the scope and extent of the effect of its operations upon every corporation in America, even though a letter of notification is filed, or the agents of the Commission are orally notified of its small size or which would, if a letter of notification had been filed, exempt it from the operations of the Act.

III

The case also involves a question of fundamental importance regarding the right of the commission or any of its officers and agents to waive the express language of a regulation as distinglished from the waiver of a statute.

IV

The case raises an important question of consitutional law as to whether the term "offering price" is so vague, indefinite and uncertain in the regulation as not to constitute a basis which may form criminal or *quasi* criminal sanctions by way of contempt proceedings.

V

The case involves a question of whether a mere declaration of the Securities & Exchange Commission that one of its officers has reported information which, if true, *tends* to show that there may be a violation is sufficient to require the production of books and records of a corporation for several years back and compel the onerous task of producing books and records and occupying days of time in testimony.

VI

The case involves a conflict between the decision of the Court of Appeals for the Ninth Circuit and the express provision of Section 19(b) of the Securities & Exchange Act, regarding the production of books and records from a foreign country, to-wit—Panama, and an extension of congressional legislation by judicial interpretation, and therefore is an erroneous construction of the law which this court has not heretofore been called upon to construe.

WHEREFORE, petitioners pray that this Honorable Court grant its writ of certiorari and that it re-

verse the judgment and order of the United States Court of Appeals for the Ninth Circuit and the District Court of the United States.

MORRIS LAVINE
Attorney for Petitioners.

IN THE SUPREME COURT OF THE UNITED STATES

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MINES & METALS CORPORATION, STEEL, INC., S. A.,; BERTRAND L. BALL, GEORGE B. BUSH and R. I. McGINNIS,

Appellants,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Appellee.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The petitioners adopt by reference from the petition the Jurisdictional Statement, the Statute and Regulations and Constitutional Provisions involved.

OPINION BELOW

The opinion of the Court of Appeals is published as *Mines and Metals Corp. v. Securities and Excha. Comm.*, 200 Fed. (2d) 317.

SPECIFICATION OF ERRORS

I.

The United States Court of Appeals erred in holding that the Securities and Exchange Commission has

jurisdiction to and may investigate those corporations, or any corporation regardless of whether the offering of its par value consists of only 100,000 shares of stock at $1.00 per share, or its offering price is under $300,000.

II.

The Court of Appeals erred in holding that a foreign corporation that does not do any business in the United States may be compelled to produce its books and records in the United States solely because one of its officers lives in the United States.

(A)

The Court erred in its interpretation of Section 19(b) of the Securities and Exchange Act which only required the production of documentary evidence "from any place in the United States or any territory." This does not include foreign countries.

IV.

The Court of Appeals erred in holding that the Securities and Exchange Commission, its officers and agents, could not waive the requirements of Regulation A through any of its officers by being orally notified rather than by a written letter of notification.

V.

The Court of Appeals erred in holding that the requirements of the Commission to produce books and records can be made simply by a declaration of the

Securities and Exchange Commission that some of its officers have reported information which *tends* to show, without any more specific data than such a declaration, and that an investigation based upon such an order is constitutional and not void under the Fifth Amendment to the Constitution of the United States.

VI.

The Court of Appeals erred in holding that the term "offering price" is not so vague, indefinite and uncertain as to violate the Fifth Amendment to the Constitution of the United States where penal sanctions follow a failure to obey the order of the Securities and Exchange Commission.

All of these questions are of fundamental importance in the administration of the Securities and Exchange Act and the scope of its power to investigate domestic and foreign corporations in the United States, and compel the production of their books and records in the United States.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS ERRED IN HOLDING THAT THE SECURITIES AND EXCHANGE COMMISSION HAS JURISDICTION AND MAY INVESTIGATE THESE OR ANY CORPORATION REGARDLESS OF WHETHER THE OFFERING OF ITS PAR VALUE CONSISTS OF ONLY 100,000 SHARES OF STOCK AT $1.00 PER SHARE, OR ITS OFFERING PRICE IS UNDER $300,000.00.

The Securities and Exchange Commission, under the decision of the Court of Appeals, can investigate any corporation in the United States regardless of whether a letter of notification was filed or not. The scope of the investigatory powers of the Commission is thus expanded beyond any of the widest powers granted it by Congress.

In most of the States under State Blue Sky Laws the corporations of the state are required to secure a permit from its corporation commissioner or commissioner designated for the particular purpose. The federal government had adopted the Securities and Exchange Act which required a different procedure, to-wit, the filing of a registration statement, provided the corporation comes within the scope and sphere of the Securities and Exchange Commission. The registration statement is filed pursuant to Section 7 of the Securities and Exchange Act of 1933, and must contain the information therein requested and be accom-

panied by such other documents as the commission might by rule or regulation require as being necessary or appropriate in the public interest or for the protection of investors. Section 8 provides that the statement shall be effective on the twentieth day after filing thereof, or at such earlier date as the commission may determine. Certain securities are exempted under Section 3 of the Act. In the public interest, Congress has provided for the elimination of small sized corporations. Subdivision 11 of Section 3 provides an exemption for "any security which is a part of an issue sold only to persons resident within a single state or territory where the issue or said security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within such state or territory." (b) The commission may from time to time by its rules and regulations and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not *necessary to the public interest* and for the protection of investors by reason of the *small amount involved* or the *limited* character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $300,000."

To eliminate a corporation where "the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the

limited character of the public offering," the Securities and Exchange Commission has provided by rules and regulation, Regulation A, for exemption of securities "provided the aggregate offering price of the stock shall not exceed $300,000.00."

Rule 222 of the Rules of the Commission provides for letters of notification While the commission has prepared a form which may be used, its use is not required and any letter containing the information is sufficient.

The petitioners herein organized Mines and Metals, Inc., in the State of Nevada with 100,000 shares of stock of $1.00 par value each. The affidavit does not show the "offering price" or whether the stock was ever offered to the public. No statute, rule or regulation defines "offering price."

Rule 100 of the Rules of the Securities and Exchange Commission gives no definition of "offering price."

Rule 220, section (g) provides: "Where securities are offered 'at the market' the aggregate offering price thereof shall be computed on the basis of the market price as established by bona fide sales made on the first day of the offering, provided that the aggregate gross proceeds actually received from the public shall not exceed the maximum amount specified in paragraphs (a) (b) or (d) above as the case may be." The "offering price" therefore and the "par value" of a newly incorporated corporation as near as can be

determined from the regulation are the same, and in any event exemption occurs under Regulation A because of the limited character of the corporation and the small number of shares of stock with its small par value. It is a matter of common knowledge that stock in a newly incorporated company has less of a market value or offering price value than its par value. Therefore, Mines and Metals was and is exempt from the jurisdiction of the Securities and Exchange Commission. To hold that a corporation of this small size or any corporation is subject to investigation by the Securities and Exchange Commission is to go beyond the scope of the clear intent of Congress to limit its investigatory powers to corporation where "the enforcement with this title with respect to such securities" is "necessary in the public interest and for the protection of investors by reason of the large amount involved" and "does not apply to such corporations where there is a small amount involved or where there is a limited character of the public offering." (Section 11(b) of the Securities and Exchange Commission Act of 1933). To hold otherwise would be to expand the powers of the Securities and Exchange Commission to encompass practically every corporation within the United States.

For even if a letter of notification is filed the Court of Appeals says this would not limit or affect the S. E. C.'s power to investigate because the commission is not obliged to take the word of anyone who may file such a letter of notification. Of course, if such

statements were false the persons would be subject to other penal sanction contained in the criminal code.

Jurisdiction does not exist, therefore, to compel the production of petitioners' books and records.

The Securities and Exchange Commission through its officers waived any requirements of a letter of notification. It was undenied that Mr. Ball went to the offices of the Securities and Exchange Commission in San Francisco and told them about the corporation and asked them if a registration statement was necessary and he again saw Mr. Cuthbertson, attorney for the Commission in Los Angeles, and told him what he had done in San Francisco. He had the stock books of Mines and Metals with him. This was not denied by Mr. Cuthbertson.

The requirements of the letter of notification may be waived by the Commission or its officers. While a statute cannot be waived by a public officer, rules and regulations of a department may be waived.

> *Angeles Milling Co. v. Commissioner of Internal Revenue,* 325 U. S. 293, 89 L. Ed. 1619.

The Securities and Exchange Commission has delegated powers and its powers of operation are delegated to its various subordinate officers. It appears here that G. M. Cuthbertson is one of the officers who was designated by the Commission to whom was delegated the authority to make an investigation; to issue subpoenas and proceed in accordance with the needs, powers or desires of the commission.

Section 11(b) gives the commission the power from time to time by its rules and regulations, subject to such terms and conditions as may be prescribed therein, to add any class of securities exempted as provided in this section. The purpose of a letter of notification is merely to let the commission know that the corporation is of such a small size that it is not in the public interest and to require it to come within the scope of the commission's activities. No particular form of letter of notification is required. (Rule 222). There is no reason why if the information is given orally to an officer of the S. E. C. that there has not been a waiver to require the letter to be in writing.

Public offices are open to furnish information to the public, and the public should have some measure of relying on such information and should not be subject to possible criminal sanctions merely because it follows what it has been informed regarding its rights and duties through such public offices. Usually when one goes into a public office one does not inquire of the name of the clerk or deputy clerk or other person with whom one talks regarding the subject matter.

It is not denied that Mr. Ball went into the San Francisco offices and that he further discussed the matter with Mr. Cuthbertson, an attorney for the Commission. Hence there was a waiver.

II.

THE COURT OF APPEALS ERRED IN HOLDING THAT A FOREIGN CORPORATION THAT DOES NOT DO ANY BUSINESS IN THE UNITED STATES MAY BE COMPELLED TO PRODUCE ITS BOOKS AND RECORDS IN THE UNITED STATES SOLELY BECAUSE ONE OF ITS OFFICERS LIVES IN THE UNITED STATES.

Steel, Inc., is a Panama corporation with offices, books and records in Panama. It never was the intention of Congress to compel the production of such books and records merely because an officer of a foreign corporation resides in the United States.

A

THE COURT ERRED IN ITS INTERPRETATION OF SECTION 19(B) OF THE SECURITIES AND EXCHANGE ACT WHICH ONLY REQUIRED THE PRODUCTION OF DOCUMENTARY EVIDENCE "FROM ANY PLACE IN THE UNITED STATES OR ANY TERRITORY." THIS DOES NOT INCLUDE FOREIGN COUNTRIES.

The language of Section 19(b) is clear. That section provides only for "such attendance of witnesses and production of such documentary evidence may be required from any place in the United States or any Territory, at any designated place of hearing." The words "in the United States" clearly refer to the States of the United States "or any territory" refers to the territories, such as Hawaii. It does not refer to any foreign territory or country.

It is clear that Section 19(b) limited the scope and jurisdiction of the S. E. C. and did not permit such exploration of a foreign corporation.

The court relies upon its decision in *Securities and Exchange Commission vs. Minas de Artemisa,* (9th Cir.), 150 Fed. 2d 215, 217 for its authority, however, to expand the plain meaning of the statute. That case never came to this court. Furthermore, an examination of that case shows the following to be the facts:

> "In 1931 one Kendall owned all but the qualifying shares of Sonora Copper Mining Company,

a Colorado corporation, which held a group of mining claims in Sonora, Mexico. At that time Kendall organized Artemisa Mines, Inc., under the laws of Arizona, and took a majority of its authorized shares in exchange for the stock of the Colorado corporation. In 1936 Kendall caused the organization of Minas de Artemisa, S. A., a Mexican corporation, appellee in this case. Appellee issued its stock to Sonora Copper Mining Company in exchange for the mining claims. The latter corporation then transferred the stock of the Mexican corporation to Artemisa Mines, Inc., as a liquidating dividend. Thus the mining claims are now owned by the Mexican corporation, all the stock of which is owned by the Arizona corporation, and the latter corporation in turn is controlled by Kendall. Kendall, an American citizen, is president both of appellee and of the Arizona corporation. From his homes in Bisbee and Tucson, Arizona, he has conducted all of appellee's corporate business and activities except the actual operation of its mine. There is evidence that some of the appellee's books and documents have been kept in the office of its attorney in Nogales, Arizona."

There is no evidence in the instant case that there were any operations in the United States; that all the corporate business and activities except the actual operation of its mines are conducted in the United States, or that any of the books and documents have been kept in the office in the United States, as was the case in *Securities & Exchange Commission v. Minas de Artemisa.* Hence, the court has extended the jurisdic-

tion beyond the authority given to it by Congress and has failed to differentiate its own case upon the facts herein relied upon.

VI.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TERM "OFFERING PRICE" IS NOT SO VAGUE, INDEFINITE AND UNCERTAIN AS TO VIOLATE THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHERE PENAL SANCTIONS FOLLOW A FAILURE TO OBEY THE ORDER OF THE SECURITIES AND EXCHANGE COMMISSION.

The words "offering price" are nowhere defined in the statute or regulation. The compulsion to bring in books and records carry penal sanctions for failure to do so. A regulation which carries with it such penal sanctions for contempt or otherwise, should be so clear and well defined that any person may know whether they come within its scope. Neither the statute nor the regulation have such clear definitions.

(See *M. Kraus & Bros. v. United States*, 327 U. S. 614, 90 L. Ed. 894).

In this case this Honorable Court said, 327 U. S. 621, 622, 90 L. Ed. 898, 899:

> "The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The

elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action. . . . Words used by him to describe evasive action are to be given their natural and plain meaning, supplemented by contemporaneous or long standing interpretations publicly made by the Administrator. But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States v. Resnick*, 299 U. S. 207, 81 L. ed. 127."

In the instant case the words "public offering" have not been defined. They have left to conjecture whether the par value of a stock just being issued is equivalent to public offering or less, or more. A citizen must look to the regulation to determine whether he comes within its scope and whether he may be subject to criminal sanction or be in contempt for failure to

That the words "public offering" in the Regulation are so vague and indefinite as not to constitute a fair standard is demonstrated by the case of *Securities & Exchange Commission v. Ralston Purina Co.* in which this Court has granted certiorari.

The opinion of the Court of Appeals for the Eighth Circuit, 200 Fed. (2d) 85, discusses the expression "public offering" and discusses the congressional reports which in their colloquy show that the words "public offering" have not been defined either by statute or by rule or regulation.

The administrative interpretation of Section 4(1) of the Act, also discussed in the Circuit Court opinion shows that the words "public offering" have been left to guess work and have not been clearly defined by any law, rule or regulation. The opinion of the Court of Appeals for the Ninth Circuit affirming our order would therefore appear to be in conflict with the decision and opinion of the Court of Appeals for the Eighth Circuit, as expressed in 200 Fed. (2d) 85, and certiorari should also be granted in this case to resolve the apparent conflict and to establish uniformity of decision.

obey an order that may or may not come within the jurisdiction of the commission.

We respectfully submit that the regulation is too vague, indefinite and uncertain to be a standard for reasonable men to follow, and *Cf. Lanzetta v. New Jersey,* 306 U. S. 451, 83 L. ed. 888; *Winters v. New York,* 333 U. S. 507, 92 L. ed. 840; *United States v. Cohen Grocery Co.,* 255 U. S. 81, 65 L. ed. 516; *United States v. Reese,* 92 U. S. 214; *Jordan v. DeGeorge,* 341 U. S. 223, 95 L. ed. 886.

The questions here are fundamental in importance and should be passed upon by this Honorable Court.

This court has never interpreted the provisions of Section 19(b) of the Securities and Exchange Act, which only require the production of documentary evidence from any place in the United States or any territory, which the Court of Appeals has expanded to include foreign countries. The decision of the Court of Appeals has also expanded the scope of the investigative power of the S. E. C. far beyond any intention of Congress.

VII.

There is no probable cause for the investigation. The only basis for requiring the search into corporate affairs was that information reached employees of the S.E.C., which if true, *tended* to show a violation of the Act. More is required. Even where a search warrant is sought the affidavit in support of it must set out

sufficient probable cause for the search. An insufficient affidavit is never sufficient.

Gray v. U. S., 287 U. S. 124, 77 L. Ed. 212.

To be the foundation for a search there should be reasonable and probable cause not mere second handed hearsay. No corporation should be put to the expense of a search on such intangible and ethereal basis.

We, therefore, respectfully pray, that this Court review the decision of the Court of Appeals and reverse the same.

Respectfully submitted,

MORRIS LAVINE
Attorney for Appellants.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 645

MINES AND METALS CORPORATION, STEEL, INC., S. A., BERTRAND L. BALL, GEORGE B. BUSH and R. L. MCGINNIS, *Petitioners*

v.

SECURITIES AND EXCHANGE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 49) is reported in 200 F. 2d 317. The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1952 (R. 55), and rehearing was denied on December 29, 1952 (R. 55). Jurisdiction of this Court is invoked under Section 1254, Title 28 of the United States Code, and Section 22(a) of the Securities Act of 1933 (15 U.S.C. § 77v(a)).

QUESTIONS PRESENTED

(1) Whether a district court may enforce subpoenas *duces tecum* issued by the Securites and Exchange Commission in connection with an investigation into suspected violations of the Securities Act of 1933, where the stock issue which gave rise to the investigation is that of a corporation authorized to issue 100,000 shares with a par value of $1.00.

(2) Whether a district court may enforce subpoenas *duces tecum* issued by the Securities and Exchange Commission directing corporate officers within the United States to produce books and records of a foreign corporation.

STATUTE INVOLVED

The applicable provisions of the Securities Act of 1933 (15 U.S.C. § 77a *et seq.*) and the pertinent Rules and Regulations of the Commission are set forth in the Appendix, *infra,* pp. 16-25.

STATEMENT

Pursuant to Section 20(a) of the Securities Act (15 U.S.C. § 77t(a)) (Appendix, *infra*, pp. 17-18), the Commission undertook an investigation to determine whether the petitioners and other persons have violated Section 5(a) of that Act (15 U.S.C. § 77e(a)) (Appendix, *infra*, pp. 16-17), by selling common stock of petitioners Mines and Metals Corporation and Steel, Inc., to members of the public without registration (R. 9-10). Petitioners, Bertram L. Ball, George B. Bush and R. L. McGinnis are president, vice president and general counsel, and secretary-treasurer, respectively, of the two corporate petitioners. (R. 5, 16, 22, 47, 50.) The investigation was instituted by order of the Commission upon information tending to establish certain facts, recited in the order, which indicated that the petitioners and others had violated the Act. (R. 9-10.) In this order (and in subsequent supplemental orders not here material), the Commission empowered certain of its officers "to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda or other records deemed relevant or material to the inquiry" (R. 10).

One of the designated officers directed subpoenas to petitioners Ball, Bush and McGinnis ordering them to produce certain books, papers, and documents at a certain time and place. (R. 11-15.) Petitioner McGinnis was served with a subpoena to

produce books, papers and documents of Mines and Metals Corporation; petitioners Ball and Bush were each served with two subpoenas, one relating to Mines and Metals Corporation and one relating to Steel, Inc. The books, papers and documents required to be produced were specifically itemized and enumerated, the items being identical in each instance.

On February 25, 1952, the petitioners filed a motion in the District Court to suppress and quash the subpoenas. (R. 1-4.) They failed both to appear on February 26 and 27 as required by the subpoenas and to produce any of the documents required in the subpoenas. On March 4, the Commission filed a counter application in the District Court in which it requested that the court issue an order enforcing the subpoenas. (R. 5-8.) After hearing, the District Court denied the motion of the petitioners and granted the application of the Commission. Its order of March 10, specifically directed the petitioners to produce all the items, twelve in number, which were enumerated in the subpoenas. (R. 21-25.) On March 31, the District Court entered an order granting the petitioners' request for a stay pending appeal. (R. 25-31.) On November 20, the Court of Appeals affirmed the order of enforcement of the District Court (R. 49-55), and on December 29 denied a petition for rehearing. (R. 55.)

ARGUMENT

Petitioners' basic contention is that there must be a showing of probable violation of the Act on their part before the district court may enforce a subpoena issued by the Commission for the purpose of ascertaining whether or not a violation has occurred. This contention, as well as a number of subsidiary arguments purporting to show the unlikelihood of violation on their part, is wholly lacking in merit, was properly rejected by the courts below and does not warrant further review by this Court.

1. This Court has recently and unequivocally decided that an administrative agency need not establish probable violation before it is entitled to the enforcement of a subpoena for documents, books and papers. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943). Thus, in the *Oklahoma Press Publishing Co.* case, this Court stated (327 U.S. at 216):

> The result therefore sustains the Administrator's position that his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority,

> but this does not mean that his inquiry must be "limited . . . by forecasts of the probable result of the investigation . . . " *Blair* v. *United States,* 250 U.S. 273, 282; cf. *Hale* v. *Henkel,* 201 U.S. 43.

Petitioners' reliance (Pet. 36) upon *Grau* v. *United States,* 287 U.S. 124, which dealt with the issuance of a search warrant and not a subpoena, is clearly misplaced. As the *Oklahoma Press* decision points out (327 U.S. at 208-209), where an administrative subpoena is involved

> It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command.

2. Petitioners contend (Pet. 24-29) that the declared object of the investigation, determination of whether the registration requirements of Section 5 have been violated, is impossible of fulfillment because Mines and Metals Corporation is authorized to issue only 100,000 shares of $1.00 par value stock. Consequently, petitioners urge, the Commission had no jurisdiction over the stock issue and the petitioner corporations. On the hypothesis that such stock could not be sold above par, they claim the offering necessarily came within an exemption from Section 5(a), allegedly provided by Section 3(b). Section 3(b) provides:

> The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $300,000.

The limits of the exemption provided by Section 3(b) depend, not upon the par value of the stock, but upon the aggregate offering price. Petitioners' assertion that only 100,000 shares of $1.00 par value stock were offered is irrelevant, as it is common knowledge, contrary to petitioners' contentions, that stock having a par value of $1.00 is frequently offered at substantially more than $1.00 per share.

In any event, Section 3(b) does not provide any automatic exemption. It merely empowers the Commission to grant exemption "by its rules and regulations, and subject to such terms and conditions as may be prescribed therein * * *." The terms of the Commission's Regulation A (issued pursuant to Section 3(b)) (17 CFR § 230.220 *et seq.* Appendix, pp. 20-23, *infra*), in effect at the

time the present controversy arose, make exemption dependent, among other requirements, upon the filing of a letter of notification with respect to the offering five days before it is made.

Although no such letter of notification was filed by the petitioners, they allege that this requirement was complied with in respect to the offering of the stock of Mines and Metals Corporation. The basis for this allegation is petitioner Ball's affidavit to the effect that he visited the Commission's office in San Francisco and orally gave a Commission representative the information required in the letter of notification. But the provision in the Regulation that an original and two copies of each letter of notification *shall be* filed[1] necessarily requires some sort of writing, setting forth the prescribed information, although not in any particular form.[2] An oral statement of the kind indicated by the Ball affidavit clearly does not satisfy the requirements of the regulation.

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[1] See Rule 222. 17 CFR § 230.222 (Appendix, *infra*, p. 23).

[2] The statement in the text is based on the regulation in effect at the time of the offering under investigation. Rule 218 of the revised Regulation provides that "at least 10 days . . . prior to the date on which the initial offering of any securities is to be made under this regulation, there shall be filed with the Regional Office of the Commission for the region in which the issuer's principal business operations are conducted, three copies of a notification on Form 1-A . . ." (Securities Act Rel. No. 3466, March 6, 1953; 18 F.R. 1435-1436.)

Petitioners contend that, in any event, the filing of a letter of notification has been waived. This claim of waiver is based solely upon petitioner Ball's affidavit to the effect that some unidentified person at an unspecified date prior to the organization of Mines and Metals Corporation informed him that registration of the stock was not required. Quite understandably, the court of appeals below found it "difficult to deal with patience" with this argument (R. 53).[3]

Admitting that statutory requirements cannot be waived by public officers through their acquiescence or failure to act, petitioners argue, citing *Angelus Milling Co.* v. *Commissioner of Internal Revenue,* 325 U.S. 293, that administrative rules and regulations can be waived. In the first place, this Court rejected the taxpayer's claim of waiver by the Commissioner of Internal Revenue of the Treasury Regulations in the *Angelus Milling* case. In the second place, regulations pertaining to tax refund claims, as in *Angelus Milling,* are clearly

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[3] The statement in petitioner Ball's affidavit that he informed a Commission representative at the Los Angeles office that he had previously been advised "that the Securities and Exchange Commission required no registration statement for a corporation having not more than 100,000 shares of stock of the par value of $1.00 per share" (R. 17) is not supported by the affidavit of petitioner Bush. Petitioner Bush, who was present at the conference in the Los Angeles office, says that petitioner Ball stated he had been told "that it was unnecessary to file any formal registration if the corporation was not going to make a formal public offering by the company of its stock for sale to the public." (R. 19-20.)

not comparable to the regulations here involved. These regulations provide exemptions from a statute which imposes a legal duty, and failure either to qualify for the exemption or to comply with the statute results in possible criminal penalties. At least in these circumstances, the defenses of laches, waiver, and estoppel arising from actions of Government representatives cannot be asserted against the Government. *United States* v. *California,* 332 U.S. 19, 39-40. Even if the requirement of the Act could be waived, inasmuch as the factual support for the claim of waiver was tenuous, it did not require, or indeed permit, the court to conclude that the Commission was not justified in investigating to determine whether or not a violation had occurred.

3. Petitioners' contention (Pet. 33-35) that the term "offering price" contained in Regulation A is so vague and indefinite as to offend the Fifth Amendment is plainly untenable. In this connection, the claim of conflict with the decison of the Court of Appeals for the Eighth Circuit in *Securities and Exchange Commission* v. *Ralston Purina Co.,* 200 F. 2d 85, certiorari granted, No. 512, this Term, is likewise unfounded. The only relevant issue in the *Ralston Purina* case is whether the "offering" was public or private. There was no dispute concerning the constitutionality of the standard connoted by the term. In any event, Regulation A can certainly not be challenged by petitioners. If the regulation is invalid, it cannot be

a basis for a claim that their activities are exempt, and unless they do qualify for exemption under the regulation, they are properly subject to the formal registration requirements, which, of course, they have made no attempt to satisfy. Finally, this question can appropriately be decided in any proceedings arising out of the investigation. It is not one which can preclude the investigation itself.

4. The courts below are said to have erred in their refusal to rule that the books and records of Steel, Inc., are immune from inspection because they are kept in a foreign country, Panama. This claim of immunity was described by the court of appeals below as "frivolous" (R. 52), referring to its own decision in *Securities and Exchange Commission* v. *Minas De Artemisa,* 150 F. 2d 215.

For the purpose of an examination of the investigatory power of the Commission, the only difference between Steel, Inc., and the Mines and Metals Corporation is that the books and records of the former are alleged to be in Panama.[4] But this distinction does not derogate from the power of either

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[4] The Commission has treated the two corporations, which had identical officers, as presenting the same need for investigation. Thus, the Commission's order directing investigation stated that the Commission's staff had reported to it information which tended to show that Steel had sold and offered for sale to members of the public its common capital stock (R. 9). The Commission's application to the district court for enforcement stated that both Steel and Mines and Metals had their principal place of business in Los Angeles (R. 5).

the Commission or the district court to require the production of the records requested.

"A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed." Restatement of the Conflict of Laws, § 94. And as the term "state" is used in conflict of laws and specifically defined in the Restatement, it makes no difference that the required records in this case are alleged to be in a foreign country rather than a sister state of the Union.[5] Cf. *Steele* v. *Bulova Watch Co.*, 344 U.S. 280.

This power has been exercised in many cases to require the production of books and papers which are outside the territorial limits of the court. See, *e.g., Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541. Accordingly, any limitation of this traditional power must be found, if it exists, in the Securities Act of 1933. But that Act does not purport to restrict the general investigatory power.

Petitioner points to Section 19(b) of the Act (Appendix, *infra*, p. 17) as indicating a Congressional desire to limit the investigatory power of the Commission. That section provides that the Commission, for purposes of all proper investigations, may require the attendance of witnesses and the

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[5] The word "state" is defined in the Restatement (§ 2) to denote "a territorial unit in which the general body of law is separate and distinct from the law of any other territorial unit."

production of documentary records "from any place in the United States or any Territory at any designated place of hearing." But the phrase "from any place in the United States or any Territory," gives the Commission power to require the attendance of witnesses or the production of documentary evidence at a designated place of hearing "from" *the place of service of the subpoena* anywhere in the United States; it does not refer to the physical location of the witness or the documentary evidence.

As the court below stated in *Minas De Artemisa* (*supra,* at 218):

> The provision * * * was not intended to circumscribe the Commission's inquisitorial powers. It appears to be designed to override territorial restrictions which would obtain had Congress prescribed for the Commission the limitations contained in 28 U.S.C.A. § 654, relating to court subpenas.

This interpretation is in accord with the enforcement and venue provisions contained in Section 22(a) of the Securities Act and other statutes whereby process runs throughout the United States although venue is limited to a particular district. The witness' obligation to respond applies even though he may find it necessary, between the time of the service and hearing, to go to a third place either inside or outside the United States in order to obtain informa-

tion necessary to testify or to obtain documents required to be produced.[6] Under this view the phrase "from any place in the United States or any Territory" creates no loophole for corporations incorporated abroad and doing business in the United States. Subpoenas may, of course, be served only in the United States and the statute makes it clear that, when subpoenas are served, the records may be required to be produced anywhere else in the United States. The statute does not deal with the acts which the person subpoenaed may have to perform in order to comply with the subpoena; it leaves those matters to be determined by general rules. The subpoenas issued in the present case completely satisfied the statute, as the records are required to be produced "from" 333 South Highland Avenue, Los Angeles, California, and 620 A. G. Bartlett Building, 215 West Seventh Street, Los Angeles, California, where the subpoenas were served on the president and vice-president and general counsel of Steel, Inc., to the designated place of hearing, 1737 Federal Building, Los Angeles, California.

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[6] Cf. *Crittenden* v. *Barkin*, 276 Fed. 978 (S.D. N.Y. 1921), where Judge Learned Hand allowed a witness mileage from the place of service of the subpoena rather than the place of his residence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

ROGER S. FOSTER,
General Counsel,
MYER FELDMAN,
Special Counsel.
Securities and Exchange Commission.

APRIL, 1953.

APPENDIX

The pertinent sections of the Securities Act of 1933 (48 Stat. 74, as amended by the Act of June 6, 1934, 48 Stat. 905, and by the Act of May 15, 1945, 59 Stat. 167, 15 U.S.C. 77a *et seq.*) are as follows:

SEC. 3. * * *

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $300,000.

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

* * * * *

SEC. 19. (b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

* * * * *

SEC. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise,

as to all the facts and circumstances concern ing the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the Supreme Court of the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

* * * * *

SEC. 22. (b) In case of contumacy or refusal to obey a subpena issued to any person,

any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

* * * * *

SEC. 24. Any person who wilfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

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The pertinent Rules and Regulations adopted pursuant to the Securities Act of 1933 and in effect at the time of the transactions under investigation are as follows:

Regulation A

Rule 220. Securities Exempted.

(*a*) Except as provided in Rule 221 and in paragraph (*d*) of this rule, all securities offered in accordance with the terms and conditions of Regulation A, by, on behalf of, or for the benefit of an issuer shall be exempt from registration provided the aggregate offering price of the following shall not exceed $300,000:

(1) The securities of the issuer proposed to be presently offered by, on behalf of, or for the benefit of the issuer pursuant to Regulation A;

(2) All securities of the issuer currently being offered by, on behalf of, or for the benefit of the issuer under Regulation A;

(3) All securities of the issuer previously sold by, on behalf of, or for the benefit of the issuer pursuant to an offering under Regulation A commenced within 1 year prior to the commencement of the proposed offering, and

(4) All securities of the issuer neither registered nor exempt from registration nor issued in an exempt transaction which were sold by, on behalf of, or for the benefit of the issuer within 1 year prior to the commencement of the proposed offering. * * *

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(*d*) Notwithstanding the provisions of paragraphs (*a*) and (*b*), the aggregate offering price of the securities enumerated in both such paragraphs shall not exceed $300,000 in any period of 12 months.

* * * * *

Rule 222. Letter of Notification.

(*a*) No securities shall be offered under this regulation until five (5) days (Sundays and holidays excluded) after a letter of notification with respect thereto has been filed, as provided in paragraphs (*b*) and (*c*), by the issuer or by the person or persons by, on behalf of, or for the benefit of whom the offering is to be made, if other than the issuer. Every letter of notification shall contain the following information:

(1) The full names and complete mailing addresses of (A) the issuer; (B) all directors and officers of the issuer; (C) the person or persons by, on behalf of, or for the benefit of whom the offering is to be made; and (D) each principal underwriter.

(2)(A) The title of the securities proposed to be offered; (B) the principal amount of evidence of indebtedness or the number of shares or other units proposed to be offered; (C) the price per unit at which they are to be offered to the public; (D) the

aggregate amount at which they are to be offered to the public; and (E) the aggregate amount at which all securities of the issuer have been offered to the public within 1 year by the person or persons filing the letter of notification. Where securities are to be offered "at the market" the information required by (C) and (D) shall be given upon the basis of the market price as established by bona fide sales made within a reasonable time prior to the date of filing the letter of notification. Where securities are to be offered through rights or warrants having a determinable market value, compute the offering price as provided in Rule 220 (i) and state both the market value and the amount to be received by the offeror.

(3) The approximate date of the proposed public offering.

(4) A list of the jurisdictions (States, Territories, the District of Columbia, or foreign countries) in which it is proposed to sell the securities. No securities shall be offered in any jurisdiction not mentioned in the original letter of notification until a supplementary letter stating the name of that jurisdiction has been filed. However, a statement that all or part of the offering is to be made by use of the facilities of a securities exchange (naming the exchange)

shall suffice as to the securities to be so offered.

(5) If the securities are to be offered by, on behalf of, or for the benefit of the issuer, the purposes for which the net proceeds from the securities are to be used.

(*b*) An original and two copies of each letter of notification shall be filed, at least five (5) days (Sundays and holidays excluded) prior to any public offering of securities under the regulation, with the regional office of the Commission for the region in which the issuer's principal place of business is located. Form S-3b-1 may be used in supplying the information required to be set forth in the letter of notification.

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